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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. ——

THE UNITED STATES, PETITIONER

v.

JAMES JOSEPH ROBERSON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above-entitled cause on November 30, 1954.

OPINIONS BELOW

The opinions of the Court of Claims are reported at 124 F. Supp. 857 and are reproduced in the Appendix, *infra,* pp. 1a–21a.

JURISDICTION

The judgment of the Court of Claims was entered on November 30, 1954, *nunc pro tunc* as of April 7, 1954. A timely motion for new trial was denied on February 8, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTIONS PRESENTED

1. Whether the Unjust Conviction Statute (28 U. S. C. 1495, 2513) establishes a right to damages for one who has been erroneously convicted by a military court-martial.

2. Whether the statutorily prescribed Certificate of Innocence can be issued by a court having jurisdiction to grant a writ of habeas corpus but lacking jurisdiction to review the merits of the conviction.

3. Whether the statutory action for damages for unjust conviction abates with the death of the claimant.[1]

STATUTES INVOLVED

Sections 1495 and 2513 of Title 28 of the United States Code provide as follows:

> Section 1495:
>
> The Court of Claims shall have jurisdiction to render judgment upon any claim for damages by any person unjustly convicted of an offense against the United States and imprisoned.

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[1] In addition to the three questions listed, a subsidiary jurisdictional issue was urged before the Court of Claims in the Government's motion for new trial. The Government argued that the Court of Claims was without jurisdiction to entertain Roberson's action on the ground that he was convicted by an Air Force court-martial of desertion in time of war and has therefore lost the right of a citizen to sue in the Court of Claims. 8 U. S. C. 1481 (a) (8); 28 U. S. C. 2502. This question will not be discussed in this petition although it is involved in the case.

Section 2513:

(a) Any person suing under section 1495 of this title must allege and prove that:

(1) His conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted, or on new trial or rehearing he was found not guilty of such offense, as appears from the record or certificate of the court setting aside or reversing such conviction, or that he has been pardoned upon the stated ground of innocence and unjust conviction and

(2) He did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charges constituted no offense against the United States, or any State, Territory, or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution.

(b) Proof of the requisite facts shall be by a certificate of the court or pardon wherein such facts are alleged to appear, and other evidence thereof shall not be received.

(c) No pardon or certified copy of a pardon shall be filed with the Court of Claims unless it contains recitals that the pardon was granted after applicant had exhausted all recourse to the courts and that the time for any court to exercise its jurisdiction had expired.

(d) The Court may permit the plaintiff to prosecute such action in forma pauperis.

(e) The amount of damages awarded shall not exceed the sum of $5,000.

STATEMENT

On October 7, 1942, James Roberson enlisted in the United States Navy where he served until October 3, 1945 (R. 1, 9, 30).[2] Nine months later, on July 9, 1946, he reenlisted for a two year term (R. 9, 30). On December 1, 1947, approximately seven months before the expiration of this term of enlistment, Roberson sought to reenlist again under the provisions of a newly established program (R. 9–10, 30). The program provided that any person whose enlistment period was within six months of completion could reenlist immediately and receive a 30-day leave, the cost of transportation to and from his home, and a $50 bonus for each year of his service (Tr. 15–16). In an attempt to comply with the program and failing to recognize that more than six months of his enlistment period remained, Roberson's superiors accepted his reenlistment application and issued him an honorable discharge, so as to terminate his prior enlistment period (R. 9–10, 30).

However, three days later when Roberson returned from a 3-day pass and appeared before

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[2] References to the printed record in the Court of Claims are indicated (R. ——); references to the typewritten transcript of testimony in the Court of Claims are indicated (Tr. ——); references to the opinions of the judges of the Court of Claims, set forth *infra*, are indicated (App. ——).

his personnel officer to obtain permission to depart on his 30-day furlough, he was informed that his reenlistment had not been authorized by Navy regulations and was therefore void. The officer told Roberson that he had torn up the reenlistment papers (Tr. 16, 50), and when Roberson "expressed himself more forcefully than Navy custom sanctions in exchanges between enlisted men and commissioned officers" (R. 10, 30), the officer ordered him to return to his barracks, to consider himself under barracks arrest, and to await a test for intoxication (R. 10, 30).[3] Instead of complying with these orders, Roberson returned to his barracks and packed all of his belongings, including the honorable discharge which had been issued to him three days earlier. He then left the base without asking permission of anyone and returned to his home in Indiana. (R. 10, 30.)

Two months later, after receiving notice from the Navy that he was listed as a deserter, Roberson went to the Naval Recruiting Station at Sioux City, Iowa, to determine the validity of his discharge (Tr. 18, 95).[4] The recruiting officer con-

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[3] Roberson testified that he had been drink beer at an all-night pinochle game on the previous night (R. 10, 30; Tr. 58).

[4] Shortly after his arrival home in Indiana, the Roberson family moved to Iowa. This change of address appears to have caused the Navy's delay in locating Roberson and in informing him of his listed status as a deserter. (Tr. 17, 57, 94–95.)

tacted Roberson's commanding officer and headquarters in Washington, and learned that the Navy considered his discharge to be without effect (Tr. 19). Therefore, pursuant to instructions Roberson was arrested and was returned to Great Lakes Naval Training Station for trial (Tr. 19–20). On March 26, 1948, he was tried and convicted on charges of "drunkenness, disobeying the lawful order of his superior officer, desertion, conduct to the prejudice of order and discipline, breaking arrest, and unauthorized absence" (R. 9, 30). The court-martial sentenced him to a dishonorable discharge and 4 years of confinement, but, upon review, the Secretary of the Navy reduced the sentence to a bad conduct discharge and two years of confinement (R. 10, 30). Roberson was imprisoned at Norfolk, Virginia, and later at Portsmouth, New Hampshire, from March 26, 1948 to December 15, 1948 (10, 31). On the latter date, he was restored to active duty on six-months probation so long as his conduct remained satisfactory (R. 10, 31).

Upon his release he was sent to Boston for service; however, as soon as he reached Boston, he took his belongings and once again left for home, without notifying anyone, relying upon the validity of the honorable discharge issued on December 1, 1947 (10, 31). Two months later, Roberson, fearing that the FBI or the Navy would find him and return him to confinement, enlisted in the Air Force (Tr. 24, 66). After three weeks

service, he learned that "someone was at the office looking for" him; he was "afraid that they were going to send [him] back to confinement, and [he] took off from the Air Force" (Tr. 67). On September 19, 1949, Roberson was arrested by the naval authorities, charged with desertion, and imprisoned until December 8, 1949 (R. 10, 31). He was released upon order of the United States District Court for the Northern District of Illinois under a writ of *habeas corpus*. The district court issued the writ on the ground that the Navy court-martial lacked jurisdiction to try Roberson for offenses allegedly committed after the granting of the honorable discharge of December 1, 1947. (R. 10, 31.)

One month thereafter, he was arrested by the Air Force and was tried and convicted of desertion by a court-martial (Tr. 28, 69). He was sentenced to six-months confinement and a dishonorable discharge. After five-months imprisonment, he was sent back to active duty on probation, and his dishonorable discharge was suspended (Tr. 28, 69). In August 1951, he was court-martialed for a subsequent absence without leave and sentenced to 45-days confinement (Tr. 70). Upon his return to duty, he "went up and asked the Air Force if [he] could get [his] dishonorable discharge" (Tr. 30); such a discharge was ordered and he departed again (Tr. 30, 71–72).

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Returning to the District Court for the Northern District of Illinois, he sought a certificate of innocence, pursuant to 28 U. S. C. 2513 (*supra*, pp. 3–4), on the strength of the *habeas corpus* order issued by that court in December 1949. The district court reviewed the facts of his conviction by the Navy court-martial in its opinion (Deft's Ex. 1 in record filed with this Court, App., *infra*, pp. 21a–23a) and issued a certificate of innocence, apparently without having taken any additional evidence. The certificate (which was incorporated in the opinion) reads in part as follows (R. 10–11, 31):

> NOW THEREFORE, pursuant to said Section 2513 of Title 28, I hereby certify that the relator was not guilty of the offenses of which he was convicted, and for which he served confinement for eight months, and that said conviction was set aside by this Court and held to be void, and that the acts, deeds or omissions of the relator in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and that the relator did not by his misconduct or negligence cause or bring about his own prosecution.

The present action was brought in the Court of Claims on April 8, 1952. In his petition for relief (R. 1–5), Roberson set forth the history of his Navy court-martial and claimed $5,000

damages; he attached the above-quoted certificate as an exhibit. The Government's answer (R. 7–8) admitted the factual averments, but denied that the Navy conviction had been "set aside [or] held to be void on the ground that the plaintiff was not guilty of the offenses of which he was convicted" (see R. 5), and denied that the certificate of the Illinois court was sufficient to give the Court of Claims jurisdiction under 28 U. S. C. 1495, 2513. Although the testimony taken before the Commissioner of the court below was intended to relate solely to the question of damages, Roberson's enlistment and desertion from the Air Force were also revealed therein. After the Commissioner had made his report, but before the court had rendered an opinion or entered judgment, Roberson died on July 28, 1954 (see Pltf's motion to substitute and attached exhibit in record filed with this Court), leaving his parents, brothers, and sisters as heirs.

Judge Littleton, writing for the court, ruled that the Unjust Conviction Statute does apply to persons sentenced by military courts-martial, that the certificate issued by the Illinois district court was valid even though that court's jurisdiction was initially limited to *habeas corpus* proceedings, and that Roberson was entitled to the maximum $5,000 recovery (App., *infra,* pp. 1a–14a). In a concurring opinion, Judge Whitaker, with whom Chief Judge Jones concurred, approved the

result reached by the majority even though "technically the *habeas corpus* court did not have the right to try plaintiff's guilt or innocence" (App. *infra*, pp. 14a–15a). His view was that the factual determination essential to the issuance of the writ by the Illinois court (*i. e.*, that the December 1, 1947, discharge was valid) effectively determined that the charges upon which Roberson had been tried by the Navy did not constitute offenses against the United States or any state. The charge of drunkenness was excluded from his consideration on the ground that "no doubt plaintiff would never have been charged with this offense had he not been charged with the others" (App., *infra*, p. 14a). Judge Madden dissented on the basis that the Illinois district court did not have jurisdiction over the merits of Roberson's conviction and was therefore not empowered to issue the statutory certificate of innocence (App., *infra*, pp. 15a–18a).

The Government then moved to vacate the judgment, contending that the action had abated when Roberson died, and Roberson's counsel moved to substitute Roberson's estate as plaintiff. Both motions were denied, and the court granted an alternative motion made by Roberson's attorney to withdraw the judgment and to reissue it *nunc pro tunc* as of April 7, 1954, a time at which Roberson was still alive (R. 37). The Government filed a motion for new trial on December 30, 1954, which was denied on February 8, 1955.

REASONS FOR GRANTING THE WRIT

1. In ruling that the Unjust Conviction Statute applies to persons convicted by military courts-martial, the Court of Claims extended its scope of application far beyond that which Congress intended.[5] As originally enacted, the Statute was entitled "An Act to grant relief to persons erroneously convicted in courts of the United States". Act of May 24, 1938, 52 Stat. 438. In the Senate report leading to its enactment the purpose was stated as giving relief to anyone "erroneously convicted in a Federal court" (see Sen. Rep. No. 202, 75th Cong., 1st Sess., p. 1), and the House report indicated that the purpose was to provide relief for innocent persons convicted "in the United States courts". See H. Rep. No. 2299, 75th Cong., 3d Sess., p. 2. In various contexts this Court has repeatedly ruled that military tribunals are not federal courts or courts of the United States. See, *e. g. Dynes* v. *Hoover,* 20 How. 65, 79; *Burns* v. *Wilson,* 346 U. S. 137, 140, 147, 844; see, also, the statutory definition in 28 U. S. C. 451. Neither in judicial practice nor in common parlance are courts-martial considered such courts. Indeed, the constitu-

[5] The sole authority relied upon by the court below as supporting the applicability of the Statute to military courts-martial was *McLean* v. *United States,* 73 F. Supp. 775 (W. D. S. C.). The decision in that case was on the Government's motion to dismiss. Since the plaintiff has never prosecuted his claim, the Government has been unable to appeal from this non-final order.

tional basis for military courts-martial is found in Article I ("To Make Rules for the Government and Regulation of the land and naval Forces") not in Article III. It is therefore reasonable to assume that Congress selected the carefully defined phrase "courts of the United States" with the knowledge of the meaning given it by past judicial interpretation and long-standing acceptance. Cf. *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, 115. In 1948, the Statute was reenacted and codified in its present form as 28 U. S. C. 1495, 2513. The minor changes in wording then effected were made, according to the reviser's notes, "to clarify ambiguities which made the statute unworkable as enacted originally." See Appendix to H. Rep. No. 308, 80th Cong., 1st Sess., p. 139. Certainly, this does not indicate such a comprehensive change as adding all military tribunals to the scope of its application.

There was good reason for Congress to limit this statutory right to those convicted by judicial courts. The power to sue for damages for wrongful imprisonment would clearly have special consequences for the maintenance of military discipline, especially since servicemen subjected to court-martial ordinarily remain in the service. For a comparable reason, this Court has recognized an implied exception in the Federal Tort Claims Act, preventing suit for torts suffered

while on active military duty. *United States* v. *Brown,* 348 U. S. 110, 112; *Feres* v. *United States,* 340 U. S. 135.[6]

Moreover, Congress has provided an adequate substitute which can give to the unjustly convicted serviceman the redress which the Unjust Conviction Statute accords to those tried by civilian courts. Article 73 of the Uniform Code of Military Justice (Act of May 5, 1950, 64 Stat. 107, 132, 50 U. S. C. 660) provides for a petition for a new trial, within one year of approval of the sentence, to The Judge Advocate General on grounds of newly discovered evidence or fraud on the court; if relief is granted, there can be restored to the unjustly imprisoned serviceman all pay and allowances lost because of the erroneous conviction. Similarly, Article 75 (64 Stat. 132, 50 U. S. C. 662) establishes a broad power in the Secretaries of the Departments to restore convicted servicemen whose convictions have been set aside to all their rights, privileges, and property affected by the sentence, including, of course, back pay and allowances.[7]

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[6] A claim for false imprisonment cannot be brought under the Tort Claims Act. See 28 U. S. C. 2680 (h).

[7] In addition, Roberson, who was convicted prior to May 5, 1951 (the effective date of the Act of May 5, 1950), had available the special new trial procedure of Section 12 of the Act of May 5, 1950, 64 Stat. 147, 50 U. S. C. 740, providing that The Judge Advocate General is authorized "to grant a new trial, or to vacate a sentence, restore rights, privileges, and property affected by such sentence, and substitute for a dismissal, dishonorable discharge, or bad-conduct discharge" any other form of discharge. See also Ex. Ord. No. 10190,

Since loss of earnings during and because of imprisonment constitutes the primary portion of the damages under the Unjust Conviction Statute, it would be unnecessary and inappropriate to imply an alternative remedy for servicemen when Congress has so clearly provided for this situation within the military administrative process. Cf. *Feres* v. *United States,* 340 U. S. 135; *Johansen* v. *United States,* 343 U. S. 427.[8]

2. The second important question presented by the decision below relates to the determination of which are the "courts" empowered to issue the statutory Certificate of Innocence, if court-martial proceedings are covered at all. In granting the special right accorded by the Unjust Conviction Statute, Congress carefully limited its availability to those who are truly innocent and whose release or pardon is based on the merits of their clearances, rather than upon mere procedural defects. See H. Rep. No. 2299, 75th Cong., 3rd

15 Fed. Reg. 8711. This provision likewise restores to unjustly imprisoned servicemen all back pay lost because of the erroneous conviction.

[8] Relying on the District Court's interlocutory order in *McLean* (fn. 5, *supra*, p. 11) as the only judicial authority then available, a former Judge Advocate General issued a Certificate of Innocence under the Statute to Frank S. Cole. Cole's suit is now pending in the Court of Claims (No. 2–55), and the Government is defending on the ground that the Statute is wholly inapplicable.

It is the present position of the Judge Advocate General of the Army, as well as of the Judge Advocate Generals of the Navy and the Air Force, that the Statute does not apply at all to military convictions.

Sess., p. 2.[9] See, also, *United States* v. *Brunner*, 200 F. 2d 276 (C. A. 6); *Sinclair* v. *United States*, 109 F. Supp. 529 (Ct. Cl.), certiorari denied, 345 U. S. 974. Seeking to obtain this result, Congress divided the responsibility for ruling on a claim under the Statute. The task of determining whether the claimant is actually innocent is delegated to the court which has set aside his conviction, presumably because that tribunal can best determine the merits of his appeal for justice; the award of the damages suffered is made by the Court of Claims on basis of the other court's record or certificate. These fundamental purposes of compensating only the truly innocent and of relying on the determination of the tribunal which heard the merits are both nullified by the ruling below which accepts a certificate from a court having jurisdiction only for the purpose of *habeas corpus* proceedings.

A court which passes upon a petition for *habeas corpus* has no authority to consider the merits of a conviction. See *McNally* v. *Hill*, 293 U. S. 131, 136–39. Especially in the case of court-martial convictions, the *habeas corpus* court looks only to the jurisdiction of the tribunal which tried the defendant, in this case a Navy court-martial. *Burns* v. *Wilson*, 346 U. S. 137. In the language of the statute, it is not "the court setting aside

[9] The issuance of a certificate is discretionary with the district court even when the defendant has been acquitted by a jury. *Rigsbee* v. *United States*, 204 F. 2d 70 (C. A. D. C.).

or reversing such conviction" of the claimant "on the ground that he is not guilty of the offense of which he was convicted." 28 U. S. C. 2513 (a) (1), *supra,* p. 3. The ruling of a court issuing the writ of *habeas corpus* on behalf of a military defendant almost always involves procedural matters rather than the substantive merits of the conviction. Such a court is in no better position to assay the defendant's innocence than the Court of Claims, and certainly far less competent to do so than The Judge Advocate General or other authority within the military system. See *Cox* v. *United States,* 112 F. Supp. 494, 496 (N. D. Cal.) and cf. *Burns* v. *Wilson,* 346 U. S. 137.

The facts of this case exemplify the difficulties which can result if the certificate in court-martial cases is issued by a court whose only prior connection with the defendant was the granting of *habeas corpus* for jurisdictional or procedural defects. The charges upon which the claimant was originally tried by the Navy court-martial included "drunkenness" (R. 9, 30), which was a crime under Virginia law (Va. Code, Sec. 18–114 (1950 ed.)), whether or not he was subject to Navy Jurisdiction.[10]

Also, at the time *habeas corpus* was issued by the Illinois district court in December 1949, Roberson

[10] Section 2513 (a) (2) provides that claimant must show that the acts charged constituted no offense against the United States or any State, etc., *supra,* p. 3.

was being held for a second court-martial for desertion from the Navy, and the only issue before the district court was whether he was then being lawfully held *by the Navy.* But the district court's determination that he had been discharged from the Navy in 1947 did not mean, as the court below seems to have concluded (App., *infra,* pp. 3a, 10a, 11a–13a, 19a–21a), that his later unauthorized absence in 1949 "constituted no offense against the United States" (see fn. 10, *supra,* p. 16). For the record shows that even if he was not subject to *Navy* jurisdiction in 1949, he was clearly at that time absent from the *Air Force* (Tr. 24, 66–67), *supra,* pp. 6–7), an offense for which he was subsequently court-martialled and lawfully imprisoned (Tr. 28, 69, *supra,* p. 7). In these circumstances, the issuance of *habeas corpus* was in effect merely a ruling that he was then being held for trial by a service without authority over him; there was no adjudication of the claims of the Air Force. And the certificate of innocence did not go further than the issue of the *Navy's* competence, for the district court's opinion (App., *infra,* pp. 22a–23a) shows that no inquiry was made beyond a recognition of the writ previously granted. Thus, to the extent that the certificate covered, and the Court of Claims considered, Roberson's confinement by the Navy after 1948, no account has been taken of the requirement of Section 2513 (a) (2) (*supra,* p. 3) that the charges against the claimant must have

constituted no offense against the United States.[11] If the certificate had been issued by the proper military authority—assuming that the Statute applies—difficulties such as this would have been avoided or minimized.

3. The significance of the ruling below appears plainly from consideration of the large and continuing number of court-martial convictions together with the practical fact that the Court of Claims will, in all probability, become the sole forum for unjust conviction suits by servicemen.[12] This Court is aware, in general, of the numbers of cases heard annually by the military tribunals of the three services. Specifically, the Department of the Army informs us that during the years 1953–1954 there were 9,184 persons who were convicted by Army general courts-martial. Of this number, five were sentenced to death and all but 471 of the remainder were sentenced to confinement. In 22 of these cases, the findings and

[11] The district court's certificate refers to "confinement for eight months" (R. 10–11), *supra*, p. 8), but both Roberson and the Court of Claims have apparently considered this to be an adjudication of Roberson's innocence during both periods of detention by the Navy (see R. 3–4; Court of Claims' finding 8, App., *infra*, pp. 20a–21a; opinion, App., *infra*, pp. 19a–21a), and the court considered the confinement in 1949 in computing and awarding damages. At the very least, it was error to include the 1949 Navy detention and the Air Force detention as a ground for damages.

[12] Even if the district courts may also enforce the Unjust Conviction Statute—despite its reference to the Court of Claims (*supra*, p. 2)—it is unlikely that suit will be brought elsewhere if the decision below stands.

sentence were set aside and the charges dismissed upon administrative review; although 14 rehearings were ordered, only one man was acquitted on rehearing during that period. Thus, for the Army alone, the extension of the Unjust Conviction Statute to include military convictions could have meant that 23 claims (those convictions set aside on review and on rehearing) were potentially authorized under the Statute during those two years. Although no data has been obtained from the other branches of the armed forces, there is no reason to believe that a comparable number of claims would not have arisen in each of them, proportionate to their relative size. And the problem is, of course, a continuing one with a substantial increment of possible claimants each year.[13]

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[13] The court below also made a *sub silentio* decision that an action under the Unjust Conviction Statute survives the death of the injured party. Assuming, *arguendo*, that the certificate issued by the Illinois district court was valid, the claimant's death on July 28, 1954, came after an adjudication of his individual right to recover but before the damages had been judicially settled by the entry of judgment by the Court of Claims. At common law, actions for personal torts abate with the death of the plaintiff. *Almour* v. *Pace*, 193 F. 2d 699 (C. A. D. C.). Traditionally, suits for false imprisonment, in the absence of a survival statute, are included in the class of actions which do not survive the plaintiff's death. *Whitten* v. *Bennett*, 77 Fed. 271 (C. C. D. Conn.); *Ferguson* v. *Lambert*, Fed. Cas. No. 4739 (C. C. S. D. Ohio). The statute involved here does not indicate that the right survives a claimant's death; on the contrary, both the personal nature of the injury compensated and the language

CONCLUSION

It is respectfully submitted, therefore that this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

MAY 1955.

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of the Act suggest that the action dies with the claimant. The jurisdiction of the Court of Claims is established by 28 U. S. C. 1495 (*supra*, p. 2) for a suit "*by any person unjustly convicted.*" The act continues in 28 U. S. C. 2513 (a) (1) to provide that the person suing under section 1495 must prove that "*His conviction* has been reversed or set aside on the ground that *he is not guilty* * * *, or on new trial or rehearing *he was found not guilty* * * *, or that *he has been pardoned.*" Subsection (2) adds that the complainant must also prove that "*He did not commit* any of the acts charged or *his acts* * * * constituted no offense * * *, and *he did not* by misconduct or neglect cause or bring about *his own prosecution.*" [Emphasis added.] Nowhere does the statute provide that the claimant's assigns, heirs, administrator, or estate shall have any right to recover.

The question whether this action survived or abated upon Roberson's death was apparently decided by the Court of Claims by the entry of judgment *nunc pro tunc* as of a date prior to Roberson's death. See *supra* p. 10. However, the use of this procedural device does not eliminate the necessity for ruling on the substantive abatement question. Cf. *McGrath* v. *N. A. M.*, 344 U. S. 804 (judgment ordered vacated for failure to substitute though district court had ordered judgment *nunc pro tunc* as of time when named defendant held office). This issue has importance not only in the administration of the Unjust Conviction Statute but also in the application of private acts for relief in the Court of Claims.

In the United States Court of Claims

No. 158–52

(Decided October 5, 1954)

JAMES JOSEPH ROBERSON v. THE UNITED STATES

Mr. Clarence G. Pechacek for plaintiff. *Mr. Franklin E. Gill* was on the brief.

Mr. John R. Franklin, with whom was *Mr. Assistant Attorney General Warren E. Burger*, for defendant.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff brings this suit under the Act of June 25, 1948, 62 Stat. 941 and 978 (28 U. S. C. § 1495 and § 2513), to recover $5,000 (the statutory maximum) on account of damages allegedly sustained by him because of his erroneous conviction of offenses against the United States and imprisonment therefor.

Defendant urges: (1) That plaintiff's conviction by a Navy General Court Martial which was later held by a United States District Court not to have had jurisdiction of plaintiff's person is not such an unjust conviction as is contemplated by the unjust conviction statute; (2) that the certificate of innocence issued by the District Court is invalid, because that court had not tried the plaintiff, and, in the *habeas corpus* proceedings, inquired only into the legality of plaintiff's conviction and detention; and (3) that plaintiff has failed to prove any damages.

On October 27, 1942, at the age of 18 years, plaintiff enlisted in the United States Navy. He was in combat duty as an aerial gunner in the Pacific theatre and was awarded the Distinguished Flying Cross, four Air Medals, and a Navy Unit Commendation. Plaintiff's enlistment was ter-

minated by honorable discharge on October 3, 1945. On July 9, 1946, plaintiff reenlisted in the Navy for a period of two years.

On December 1, 1947, more than seven months before the second enlistment would have expired, plaintiff was given an honorable discharge. Coincidentally with the receipt of this discharge, plaintiff signed reenlistment papers. This procedure was followed in what proved to be an unsuccessful attempt by Navy officers to comply with a regulation designed as an incentive to reenlistment by enlisted personnel whose terms of enlistment were approaching completion. Incentives to such reenlistment included a substantial cash bonus, some additional leave, and travel expenses.

On the morning of December 4, 1947, three days after plaintiff had signed reenlistment papers, he returned to barracks after a period of liberty. He had been engaged in an all-night card game and had been drinking beer. An officer unhappily chose this particular occasion to tell plaintiff that compliance with the reenlistment regulations had not and could not be had in plaintiff's case and that therefore plaintiff would not receive his bonus, leave, or travel allowance. An altercation arose between plaintiff and the officer during which plaintiff must have expressed himself more forcefully than Navy custom sanctions in exchanges between enlisted men and commissioned officers, for the officer ordered plaintiff under barracks arrest and to undergo a test for intoxication. Plaintiff returned to his barracks, and, in view of what the officer had told him about the reenlistment, plaintiff gathered up his gear, including his honorable discharge papers dated December 1, 1947, and, without advising or consulting with anyone, departed for home.

Nearly four months later, on March 26, 1948, plaintiff was tried and convicted by a Navy General Court Martial on charges of drunkenness, disobeying the lawful order of his superior officer, desertion, conduct to the prejudice of good order and discipline, breaking arrest, and unauthorized absence, all of which offenses were alleged by the Navy to have occurred after December 1, 1947 (the date on which he received his honorable discharge and signed the ineffectual reenlistment papers). The court martial sentenced plaintiff

to be confined for a period of four years and to be dishonorably discharged.

Upon review by the Secretary of the Navy, the period of plaintiff's confinement was reduced to two years, and a bad conduct discharge was substituted for the dishonorable discharge. Thereafter, upon the recommendation of the Navy Sentence Review and Clemency Board, approved by the Acting Secretary of the Navy, an order was issued that plaintiff be restored to duty if his conduct was satisfactory on six months' probation.

Plaintiff was imprisoned from March 26, 1948 to December 15, 1948, a period of 8 months and 19 days. The end of his confinement came as a result of his release from the Navy Disciplinary Barracks, Portsmouth, New Hampshire, for restoration to duty in Boston, Massachusetts, subject to probation. However, instead of reporting for duty, plaintiff, relying on his December 1, 1947 honorable discharge, again went home.

Some nine months later, on September 19, 1949, plaintiff was again arrested and placed in confinement by the Navy on a charge of desertion. He remained in prison until December 8, 1949, a period of 2 months and 18 days, when he was released upon order of the District Court of the United States for the Northern District of Illinois in *habeas corpus* proceedings. The District Court found and held that plaintiff had received a valid honorable discharge on December 1, 1947, which placed his person beyond the jurisdiction of the Navy to try him for acts committed subsequent to that date.

Thereafter, plaintiff applied to the same District Court for a certificate of innocence fulfilling the requirements of section 2513 of title 28 of the United States Code, in order that he might pursue his remedy under the provisions of section 1495 of that title in the United States Court of Claims. On February 19, 1952, Judge Philip L. Sullivan issued a document entitled "CERTIFICATE OF INNOCENCE" which recited that application therefor had been made under section 2513 for the purpose of suit under section 1495 of title 28. After reviewing certain facts relative to the Navy court martial and the issuance of the writ of *habeas corpus*, the judge closed with the following statement:

NOW THEREFORE, pursuant to said Section 2513 of Title 28, I hereby certify that the relator was not guilty of the offenses of which he was convicted, and for which he served confinement for eight months, and that said conviction was set aside by this Court and held to be void, and that the acts, deeds or omissions of the relator in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and that the relator did not by his misconduct or negligence cause or bring about his own prosecution.

On April 8, 1952, plaintiff filed his petition in the Court of Claims asking for relief under the provisions of title 28, sections 1495 and 2513 of the United States Code.[1]

Defendant first urges that the conviction of plaintiff by a Navy General Court Martial, which was later held by a United States District Court not to have had jurisdiction of plaintiff's person, was not such an unjust conviction as was contemplated by sections 1495 and 2513 of title 28. The only case cited by either party directly in point on the question is *McLean* v. *United States*, 73 F. Supp. 775 (1947). Defendant concedes that the holding in that case is squarely against defendant's position herein, but urges that the decision is erroneous.

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[1] In the enactment of the judicial code, the Act of June 25, 1948, 62 Stat. 941, section 1495 provides:

"Damages for unjust conviction and imprisonment; claim against United States

"The Court of Claims shall have jurisdiction to render judgment upon any claim for damages by any person unjustly convicted of an offense against the United States and imprisoned."

Section 2513 provides:

"Unjust conviction and imprisonment (a) Any person suing under section 1495 of this title must allege and prove that:

"(1) His conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted, or on new trial or rehearing he was found not guilty of such offense, as appears from the record or certificate of the court setting aside or reversing such conviction, or that he has been pardoned upon the stated ground of innocence and unjust conviction and

"(2) He did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution.

"(b) Proof of the requisite facts shall be by a certificate of the court or pardon wherein such facts are alleged to appear, and other evidence thereof shall not be received.

* * * * *

"(e) The amount of damages awarded shall not exceed the sum of $5,000."

In *McLean* v. *United States*, *supra*, the plaintiff, suing in the District Court for damages under 18 U. S. C. 729, 730,[2] had been convicted of manslaughter by United States Navy Court Martial and sentenced to five years imprisonment and to a dishonorable discharge. In his District Court action plaintiff alleged that his conviction had been set aside by the Judge Advocate General of the Navy who had adjudged that plaintiff was not guilty of the crime of which he had been convicted, that his conduct in connection with the charge did not constitute a crime against the United States, etc., and that he had not in any way contributed in bringing about his own arrest and conviction. The government contended that the unjust conviction statute did not cover court martial convictions. The District Court held that the statute does cover court martial convictions as well as civilian court convictions because (1) the substance of the statute is that any person unjustly convicted of an offense against the United States may maintain suit against the United States for damages sustained as a result of such unjust conviction and imprisonment; (2) that a person tried by Navy Court Martial is tried for an offense against the United States because the basis for any prosecution in such proceeding is necessarily a violation of the Articles for the Government of the Navy enacted by Act of Congress; and (3) that a violation of an Act of Congress is an offense against the United States. The court also held that a Navy Court Martial and the review of its action by the Judge Advocate General are judicial proceedings within the meaning of the word "court" as used in the statute, especially when the purpose of the statute is kept in mind. At pages 778 and 779, Judge Wyche stated:

> This Act is a remedial act designed by a fair-minded government as a means of at least partially righting an irreparable wrong done to one of its citizens. It has the beneficent purpose of attempting to compensate, as well as money can compensate for such an injury, the

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[2] According to the Reviser's Note, sections 1495 and 2513 were based on sections 729–732 of Title 18 U. S. C. (Act of May 24, 1938, 52 Stat. 438), which latter sections were consolidated and rewritten "to clarify ambiguities." The District Court has held that it has concurrent jurisdiction with the Court of Claims to award damages in cases arising under the unjust conviction statute. *McLean* v. *United States*, *supra*.

> plaintiff for the loss of his liberty through an error on the part of his government. One convicted in a court martial is just as effectively deprived of his liberty as one convicted in the district court of the United States. The same sovereign is responsible for the wrong that has brought about his suffering. It is, therefore, my opinion that the Act covers a conviction in a court martial.

We find nothing in the legislative history of the basic legislation (Act of May 24, 1938, 52 Stat. 438, 18 U. S. C. 729–732) to refute Judge Wyche's conclusions. On the contrary, that history and Judge Barksdale's decision in *United States* v. *Keegan*, 71 F. Supp. 623, analyzing at length the statute and its history, supports the soundness of Judge Wyche's decision. Accordingly, we hold that unjust convictions and imprisonments by courts martial are within the purview of the unjust conviction statute.

Defendant next contends that the certificate of innocence issued to plaintiff by the District Court should not be accepted by the Court of Claims as the necessary statutory proof of plaintiff's innocence. Defendant says that the District Court lacks jurisdiction to issue a certificate of innocence to any person whose conviction by military court martial has been set aside by a writ of *habeas corpus*, because the *habeas corpus* proceedings were not concerned with guilt or innocence within the meaning of the unjust conviction statute.

In *Hadley* v. *United States*, 106 C. Cls. 819, cited by defendant as authority for its argument, Hadley relied upon the District Court order in his *habeas corpus* proceedings as constituting the necessary statutory proof of his innocence in the Court of Claims. In dismissing Hadley's petition, this court merely held that the *habeas corpus* order did not contain all the necessary statutory recitals concerning his innocence and did not decide whether the order would have been sufficient proof of innocence had it contained such recitals.[3]

Plaintiff in the instant case is not relying upon the order in his *habeas corpus* proceeding as proof of his innocence. In

[3] In *Weiss* v. *United States*, 120 C. Cls. 1, and in *Roberts* v. *United States*, 126 C. Cls. 947, also relied on by defendant, the petitions were dismissed because the necessary statutory recitals concerning innocence did not appear in any documents submitted to this court.

an entirely separate proceeding instituted some two years after the issuance of the *habeas corpus* order, plaintiff made application to the same District Court for a certificate of innocence for the purpose of seeking damages in the Court of Claims under the unjust conviction statute. This proceeding was concerned solely with the matter of plaintiff's innocence and as a result of it the District Court upon the record and its decision issued a certificate containing all the necessary statutory recitals.

The unjust conviction statute gives to the court which sets aside a prisoner's conviction the power to entertain his application for a certificate of innocence. There is no indication in the statute or its legislative history that a person whose court martial conviction has been set aside by writ of *habeas corpus* is less entitled to a hearing upon his application for a certificate of innocence than the person whose civilian court conviction has been set aside by an appellate court on grounds having nothing to do with his guilt or innocence. See *Andolschek* v. *United States*, 111 C. Cls. 567, discussed hereinafter. We think that the District Court had jurisdiction to entertain the application of either person and to issue a certificate of innocence if, in the opinion of the judge, the applicant has established his innocence within the meaning of the statute.

If it is defendant's position that the District Court judge should not have issued a certificate of innocence to this plaintiff on the basis of the judgment in the *habeas corpus* proceeding because that proceeding, as defendant here contends, had nothing to do with plaintiff's guilt or innocence, defendant is not attacking the *jurisdiction* of the District Court to issue the certificate but is rather attacking the soundness of the court's decision to act favorably upon plaintiff's application. Whether or not the certification of innocence was warranted by the evidence[4] considered by the District Court

[4] We do not know, nor are we properly concerned with, what evidence the District Court relied upon, whether it was the record in the *habeas corpus* proceeding, the record in the court martial proceeding, or affidavits and oral testimony. The statute does not prescribe any procedure to be followed by the District Court in passing upon the application for certificates of innocence, nor does it indicate whether the proceeding shall be *ex parte* or adversary, apparently leaving to the discretion of the District Court judge the kind of hearing to be held.

judge is a question going to the merits of the issue of the applicant's innocence and not to the power of the judge to pass upon it. In *West Coast Exploration Co.* v. *McKay*, 213 F. 2d 582, cert. den. 347 U. S. 989, the court said:

> A court is said to have jurisdiction, in the sense that its erroneous action is voidable only, not void, when the parties are properly before it, the proceeding is of a kind or class which the court is authorized to adjudicate, and the claim set forth in the paper writing invoking the court's action is not obviously frivolous. * * * [p. 591.]

The Circuit Court quoted from the case of *Brougham* v. *Oceanic Steam Navigation Company*, 205 F. 857, as follows:

> The jurisdiction with which we are concerned is the power to hear and determine a cause. It is not limited to making correct decisions but includes power to decide wrong as well as right. As applied to a particular controversy it is the power to hear and determine the subject-matter of that controversy. And by this is meant the power to hear and determine causes of the class to which the particular controversy belongs. It is the power to act upon the general question in its relation to the facts presented; to adjudge whether such facts call for the exercise of the abstract power. [p. 859.]

If the District Court judge in the instant case erred on the merits in granting or denying the issuance of the certificate, his decision is not open to collateral attack in the Court of Claims. It should be questioned, if at all, on appeal to the Circuit Court of Appeals which has appellate jurisdiction over the District Courts.

In *Rigsbee* v. *United States*, 204 F. 2d 70, Rigsbee appealed to the Circuit Court from the District Court's refusal to issue a certificate of his innocence. The Circuit Court entertained the appeal and affirmed the action of the District Court judge but noted in so doing that because the issuance of the certificate had been left to the discretion of the District Court judge. the appellate court should review only where the decision was completely capricious and without any rational basis. The Circuit Court had the following to say on this matter:

> As we have said, whether to issue a certificate of innocence is left to the discretion of the trial judge. The statute calls for his opinion on a factual matter, and does

> not in terms afford appellate review. Whether his expression of opinion is a final order of the District Court, open to appeal for that reason, might well be questioned. It could be said that, strictly speaking, the refusal to certify innocence is not an order of the District Court but a mere expression of the judge's personal conviction which Congress called upon him to give. On the other hand, were there no appeal, a wholly arbitrary refusal could unjustly prevent the assertion of a meritorious claim. Legislative clarification of the statute seems desirable. [p. 73, footnote 3.]

In *United States* v. *Brunner*, 200 F. 2d 276, the Government appealed from the District Court's decision to issue a certificate of innocence to Brunner. On the basis of the certificate, Brunner had already secured a judgment of $500 from the Court of Claims (*Brunner* v. *United States*, 122 C. Cls. 48) although this court entertained lively doubts about Brunner's innocence within the meaning of the unjust conviction statute. The Circuit Court, finding jurisdiction to entertain the appeal in 28 U. S. C. § 2515 (b), held that the District Court had erred in issuing the certificate without taking into consideration certain testimony of Brunner's wife contained in the record of Brunner's criminal trial. The Circuit Court pointed out that although Brunner's conviction had been properly reversed on the ground that his wife's testimony had been improperly admitted and could not support the judgment of conviction, it was both proper and necessary for the District Court to consider such testimony in deciding whether Brunner was entitled to a certificate of innocence which would form a basis for his suit against the government for damages under the unjust conviction statute. The cause was remanded to the District Court with instructions to reconsider its decision in the light of the whole record including the testimony of Brunner's wife. Subsequently, the District Court set aside its previously issued certificate of innocence and the Court of Claims then granted defendant a new trial, and vacated its earlier judgment for Brunner on the ground that the record no longer contained support for the allegations of innocence contained in the petition. (124 C. Cls. 643.)

In *Andolschek* v. *United States*, 111 C. Cls. 567, the issues were closely analogous to those in the instant case. Andolschek had not obtained a formal certificate of innocence but

relied upon findings and recitals contained in the District Court's judgment and decree dismissing the indictment against him. Those recitals met all the requirements of the unjust conviction statute concerning innocence but the defendant urged that the Court of Claims should not accept such recitals as proof of innocence because the judgment and decree containing them had been issued upon mandate of the Circuit Court of Appeals which had reversed Andolschek's conviction on grounds having nothing to do with Andolschek's guilt or innocence within the meaning of the unjust conviction statute. It was defendant's position that Andolschek was not entitled to the certificate and that the District Court judge had erred in granting it. The Court of Claims held that it could not go behind the findings and recitals of the District Court nor inquire into the record in Andolschek's case in other courts on the question of his guilt or innocence because the unjust conviction statute clearly provides that the only evidence admissible in the Court of Claims on the issue of a plaintiff's innocence shall be a certificate of the court in which he was found not guilty.[5]

We are of the opinion that the District Court had jurisdiction to entertain plaintiff's application for a certificate of innocence and to issue that certificate upon being satisfied that plaintiff was in fact innocent within the meaning of the unjust conviction statute. Inasmuch as the certificate is conceded by defendant to be authentic, and it contains all the recitals required by the statute, this court is bound by such recitals on the question of plaintiff's innocence unless that certificate is set aside upon order of the Circuit Court of Appeals.

Defendant urges that plaintiff's proof of damages is incompetent and too remote and speculative to support any award whatsoever. The Commissioner of this court has found that plaintiff was damaged in excess of the statutory

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[5] The legislative history of the 1938 act makes it quite clear that the question of plaintiff's innocence is not to be tried in the Court of Claims. In H. Rep. 2299, 75th Cong., 3d Sess., the following statement appears:

"(2) In the House bill, innocence must be established by the courts or pardoning authority before a claim for damages is presented to the Court of Claims, which only hears the question of damages. The Senate bill would give the Court of Claims jurisdiction to try the facts of the applicant's innocence."

The provisions of the House bill were enacted into law.

limit of $5,000 and we hold that the record fully supports that finding (finding 9). We shall discuss briefly defendant's exceptions to the various items of damage found by the Commissioner and our reasons for deeming those exceptions to be without merit.

Defendant excepts to the Commissioner's finding that plaintiff suffered loss of earning power while awaiting and undergoing trial and during his confinement by the Navy. Defendant says that up to the time of his release on the writ of *habeas corpus*, plaintiff had no civilian occupation from which he could have made a living and that the only trade he knows today, i. e., the printing trade, he was later taught by the Air Force.

The record reveals that prior to his first enlistment in the Navy, plaintiff had become an experienced and competent farmer, having been in nearly complete charge of the family's fair sized farm for two years while his father was working in a war plant some 65 miles from home. Between plaintiff's first and second confinement for desertion, plaintiff worked for three different farmers in Iowa, earning $110 per month plus room, board and laundry. Plaintiff was also a well-trained and experienced machinist. Following his graduation from high school, he completed a 400-hour machinist course. For the month and a half before he enlisted in the Navy, plaintiff worked for the Ertel Machine Shop in Indianapolis, Indiana, earning $30 a week. During plaintiff's first enlistment in the Navy, he completed two courses in aviation mechanics, receiving a certificate in each instance, and throughout his whole Navy career he served as an aviation mechanic. Everything in plaintiff's record reveals him to have been capable and industrious and it is reasonable to conclude that but for his arrest and conviction by the Navy he would have been able to secure and hold good jobs either as a farmer or as a mechanic. It is worthy of note that plaintiff commenced his own training in the printing trades prior to the time the Air Force assigned him to the print shop. At that time plaintiff had already held jobs on two newspapers, earning $55 per week.

Defendant also excepts to the Commissioner's finding that plaintiff's pecuniary losses resulting from his arrest and

confinement by the Navy were of a continuing nature. It appears to be defendant's position that any continuing loss of earning power was due to plaintiff's instability as evidenced by his frequent job changes and his curious career in the Air Force. It was the Commissioner's opinion, with which we agree, that plaintiff's so-called emotional instability was the direct result of his conviction and his imprisonment in a Navy penitentiary. The transcript of testimony taken at the trial reveals that plaintiff was even then laboring under nervous tension aggravated by feelings of outrage and disgrace which, unless relieved, may continue to hamper his efforts to settle down and live a normal life.*

Defendant also excepts to the finding that plaintiff suffered nonpecuniary losses due to his deprivation of liberty while undergoing trial by the court martial and during confinement, and to the humiliation attendant thereto. Defendant suggests that the instant plaintiff's familiarity with prison walls (military and civilian) prior to his conviction by the Navy should serve to mitigate defendant's liability for damages on the authority of this court's decision in *Brunner* v. *United States*, 122 C. Cls. 48. In our opinion nothing could be more inapposite than the *Brunner* case in the light of the facts in the instant case. Mr. Brunner had spent all or part of every year from 1935 to 1947 in prison. He was a chronic law violator and had been convicted of being drunk and disorderly, of petty larceny and vagrancy, attempted homicide, motor vehicle theft, parole violations, robbery, embezzlement, skipping bond, violation of the mail statutes, and of grand larceny. In view of that history, the court was of the opinion that Brunner's imprisonment as a result of the alleged unjust conviction could not have been too humiliating an experience. The instant plaintiff's record for misbehavior up to the time of his conviction consisted of a deck court martial and a ten-day sentence in the

* Reporter's note.

The petition in the instant case was filed in the Court of Claims in April 1952. The Commissioner's report on the facts was filed with the Court on October 22, 1953. The case was argued before the Court on the facts and briefs in April 1954. The opinion herewith was announced on October 5, 1954.

It has become a matter of public knowledge that the plaintiff, James Joseph Roberson, committed suicide July 28, 1954.

hospital brig for unauthorized absence while he was convalescing from a shoulder operation during his second term of enlistment, plus an incident which occurred while he was on leave from the Navy in the fall of 1947, when plaintiff and several others were picked up by the Indianapolis police on suspicion of carrying concealed weapons. After being kept in jail over night, the charge against plaintiff was dismissed for insufficient evidence.

In January 1949, following plaintiff's first confinement by the Navy in New Hampshire, plaintiff was booked for investigation by the Sioux City, Iowa, police and was released after 72 hours without any charges being lodged.

Under these circumstances, we do not believe that defendant has grounds for mitigation of damages as it did in the *Brunner* case.

Further on the question of damages, defendant contends that plaintiff's unreasonable and improbable conduct should serve to mitigate defendant's damages. Unless that conduct constituted negligence in bringing about his own arrest and conviction, we fail to see how it is material, and the District Court judge has certified that plaintiff did not bring about his arrest by his own misconduct or neglect. Defendant's references to plaintiff's admittedly unhappy career in the Air Force are adequately answered by footnote (4) to finding 8 in which the Commissioner concluded that all incidents tending to show instability occurred *after* plaintiff's conviction and imprisonment by the Navy. Up to that time plaintiff was a normal American farm boy whose record in World War II was one of courage unmarred by misbehavior. Under the circumstances, it is reasonable to conclude that his later instability was caused by his reaction to his unjust conviction and imprisonment by the Navy and as such is an element of his damages rather than a factor mitigating defendant's liability for damages. We are not convinced that plaintiff's conduct was either unreasonable or improbable in view of his state of extreme anxiety and depression brought on by the Navy's treatment of him. Nor do we think it at all improbable that a young man of his background and character would be profoundly shocked and unsettled by his experiences.

On the basis of the record in this case we hold that plaintiff sustained damages in excess of $5,000. In view of the statutory limitation on the amount of award, judgment for $5,000 will be entered in plaintiff's favor.

It is so ordered.

WHITAKER, *Judge*, concurring:

The unjust conviction statute requires that the certificate of innocence be issued by the court having jurisdiction to try that fact. A court hearing a petition for *habeas corpus* has no jurisdiction to pass on the petitioner's guilt or innocence.

However, it necessarily follows from the court's finding in this case that the court martial had no jurisdiction to try plaintiff because his enlistment had expired when the offense charged was committed, that plaintiff could not have been guilty of the particular offenses charged, except one. Those offenses were: (1) disobeying the orders of his superior officers; (2) desertion; (3) conduct to the prejudice of good order and discipline; (4) breaking arrest; (5) unauthorized absence; and (6) drunkenness. Since on *habeas corpus* it was held that plaintiff's enlistment had expired when these alleged offenses were committed, plaintiff could not have been guilty of any of them, except the last.

Plaintiff could have been guilty of the drunkenness charge, although his enlistment had expired. I think, though, in the interests of justice, this charge may be disregarded. I have no doubt plaintiff would never have been charged with this offense had he not been charged with the others. They just "threw the book at him."

While technically the *habeas corpus* court did not have the right to try plaintiff's guilt or innocence, yet, since the effect of its holding was to find plaintiff innocent, I think, under a liberal construction of the statute, it had the right to issue the certificate.

It will be noted that under the first provision of the statute it was not necessary that the district judge find that the acts were not committed, but only that an offense was not committed. That court had jurisdiction to hold that an *offense* was not committed; in fact, in granting *habeas*

corpus, it necessarily held that plaintiff was innocent of any offense since it was shown that he was not in the military service at the time of the alleged acts. The court, therefore, had complete jurisdiction to hold that he was innocent of any offense, and could, therefore, certify to that fact.

It does not follow from this that it would have jurisdiction to do so as to all offenses.

Under subdivision 2, offenses against State law are included, but under State law no offense was committed unless the charge of drunkenness is to be regarded as such an offense as would preclude an otherwise meritorious action.

Giving the statute a liberal construction, as I think should be done in this case, I think the court's decision is correct, and I concur.

JONES, *Chief Judge*, concurs in the foregoing opinion.

LARAMORE, *Judge*, took no part in the consideration or decision of this case.

MADDEN, *Judge*, dissenting.

My reason for not agreeing with the opinion of the court is that I think that the District Court of the United States for the Northern District of Illinois did not have jurisdiction to make the "Certificate of Innocence" upon which the plaintiff's right to recover depends.

Section 2513 of Title 28 of the United States Code requires, so far as pertinent to this case, that one who sues for damages for unjust imprisonment prove that his conviction has been reversed or set aside on the ground that he was not guilty of the offense for which he was convicted, or that on a new trial or a rehearing he was found not guilty, and that the absence of guilt be shown by the record or certificate of the court setting aside or reversing the conviction.

The findings of this court as well as the narrative of the opinion show that the plaintiff did all the physical acts of which he was charged and convicted by the Navy court martial. The District Court, in the *habeas corpus* proceeding, had no jurisdiction to review the correctness of the court martial's decision as to the facts of the plaintiff's conduct, and, so far as appears, the court did not undertake any such

review. The court merely held that the court martial had no jurisdiction to try the plaintiff, since the plaintiff had been discharged from the Navy before the acts for which he was tried were committed.

I think that Section 2513 contemplates that the court in which the conviction, the nullification of which is to give rise to a claim for damages, is a court having jurisdiction over the merits of the conviction. The fact that one has been tried and convicted in a court not having venue of the offense, and has for that reason had his conviction reversed, would not appeal to the sense of fairness which Congress expressed in Section 2513. Congress was interested in the question of whether the convicted person had done the things of which he was convicted, and not in the question of whether he had, erroneously, been tried in the wrong tribunal.

This case is, of course, different from the case of the ex-soldier who has committed murder or some other crime, has been convicted by a court martial, and has been freed from imprisonment on a writ of *habeas corpus* by a civil court on the ground that the court martial had no jurisdiction to try one who was no longer in the Army. In this case the conduct of which the plaintiff was convicted by the court martial may not have been crimes at all, if, as the District Court concluded in the *habeas corpus* proceeding, the plaintiff was no longer in the Navy. This difference was, no doubt, the reason why the District Court essayed to give the plaintiff a certificate of innocence. But I think that this difference did not have the effect of conferring jurisdiction upon the District Court to make any decision whatever as to the factual or legal merits of the plaintiff's conviction, when the only proceeding before the court concerned the jurisdiction of the court martial to try the plaintiff.

In re Yamashita, 327 U. S. 1, 8, the Supreme Court said:

> We also emphasized in *Ex parte Quirin*, 317 U. S. 1, as we do here, that on application for habeas corpus we are not concerned with the guilt or innocence of the petitioners. We consider here only the lawful power of the commission to try the petitioner for the offense charged. In the present cases it must be recognized throughout that the military tribunals which Congress has sanctioned by the Articles of War are not courts

whose rulings and judgments are made subject to review by this Court. See *Ex parte Vallandigham*, 1 Wall. 243; *In re Vidal*, 179 U. S. 126; cf. *Ex parte Quirin*, *supra*, 39. They are tribunals whose determinations are reviewable by the military authorities either as provided in the military orders constituting such tribunals or as provided by the Articles of War. Congress conferred on the courts no power to review their determinations save only as it has granted judicial power "to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty." 28 U. S. C. §§ 451, 452. The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner. If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions. See *Dynes* v. *Hoover*, 20 How. 65, 81; *Runkle* v. *United States*, 122 U. S. 543, 555–556; *Carter* v. *McClaughry*, 183 U. S. 365; *Collins* v. *McDonald*, 258 U. S. 416. Cf. *Matter of Moran*, 203 U. S. 96, 105.

I have no quarrel with the decision in *McLean* v. *United States*, 73 F. Supp. 775. There the certificate of innocence was alleged to have been issued by the Judge Advocate General of the Navy, the official having jurisdiction to review the factual and legal merits of the conviction. I would not find it necessary to decide whether the unjust conviction statute covers court martial convictions. But if I did so decide, I would further decide that the necessary certificate of innocence must issue from a tribunal having jurisdiction to review the conviction on its merits.

Concerning the moralities of the case, I think that the plaintiff must have been aware, when he left the Navy barracks, that, in the view of the Navy, his premature discharge and his simultaneous reenlistment were both part of the same transaction, and that, the reenlistment having been found invalid, the discharge was likewise ineffective. That must have been the deliberate view of the Navy when it instituted and carried through the court martial proceedings. The conduct of the plaintiff in deciding this question for himself and abruptly going home was, it seems to me, reckless in the

extreme, and a practical invitation to the Navy to prosecute him. This reckless conduct antedated his trial and imprisonment by the Navy, to which this court attributes all the plaintiff's later difficulties. It seems to me that the plaintiff's later erratic conduct, which directly brought on his difficulties and damages, was of the same sort as and no more reckless than what he did before the supposed cause of his later conduct occurred. *Post hoc ergo propter hoc* is an unsafe doctrine even when the sequence of events makes it possible to apply it. But when substantially the same thing has occurred before, as well as after, the supposed cause of the later event, the doctrine has no logical application at all.

FINDINGS OF FACT

The court, having considered the evidence, the report of Commissioner W. Ney Evans, and the briefs and argument of counsel, makes findings of fact as follows:

1. Plaintiff enlisted in the United States Navy on October 27, 1942. He was then 18 years old. He was sent into the Pacific theatre and saw combat duty as an aerial gunner.[1] The enlistment was terminated by honorable discharge on October 3, 1945.

2. On July 9, 1946, plaintiff again enlisted in the Navy for a period of two years. This enlistment was terminated by honorable discharge on December 1, 1947.[2]

3. On March 26, 1948, plaintiff was tried and convicted by a Navy General Court Martial on charges of drunkenness, disobeying the lawful order of his superior officer, desertion, conduct to the prejudice of good order and discipline, breaking arrest, and unauthorized absence. All of these offenses were alleged to have occurred after December 1, 1947.[3]

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[1] Plaintiff was awarded the Distinguished Flying Cross, four air medals, and a Navy Unit Commendation.

[2] The honorable discharge was given to plaintiff more than seven months before his term of enlistment expired in what proved to be an unsuccessful attempt by Navy officers to comply with a regulation designed to induce re-enlistment by enlisted personnel whose terms of enlistment were approaching completion.

[3] Plaintiff's "incentive" re-enlistment was supposed to have taken place on December 1, 1947. On that day he signed re-enlistment papers and was given an honorable discharge. Among the incentives were a substantial bonus, some additional leave, and travel expenses. On the morning of December 4, 1947, plaintiff returned to barracks after a period of liberty. He had been engaged

4. The court martial sentenced plaintiff to be confined for a period of four years and to be dishonorably discharged. Upon review by the Secretary of the Navy the period of confinement was reduced to two years, and a bad conduct discharge substituted for the order of dishonorable discharge. Thereafter, upon recommendation of the Navy Sentence Review and Clemency Board, approved by the Acting Secretary of the Navy, an order was issued that plaintiff be restored to duty if his conduct was satisfactory on six months' probation.

5. Plaintiff was imprisoned from March 26 to December 15, 1948, a period of 8 months and 19 days. The end of his confinement came as a result of his release from the Navy Disciplinary Barracks, Portsmouth, New Hampshire, for restoration to duty in Boston, Massachusetts, subject to probation. Instead of reporting for duty, plaintiff in further reliance on his honorable discharge of December 1, 1947, again went home.

6. On September 19, 1949, plaintiff was again arrested and placed in confinement by the Navy, on a charge of desertion. He remained in prison until December 8, 1949, a period of 2 months and 18 days. He was released upon order of the District Court of the United States for the Northern District of Illinois (Eastern Division) in *habeas corpus* proceedings, the court holding that the action of the Navy General Court Martial was beyond its jurisdiction and therefore void, because of the honorable discharge issued on December 1, 1947.

7. On February 19, 1952, the court named in the preceding finding issued a certificate of which the following is part:

> NOW THEREFORE, pursuant to said Section 2513 of Title 28, I hereby certify that the relator was not guilty of the offenses of which he was convicted, and for which he served confinement for eight months, and that said conviction was set aside by this Court and held to be void, and that the acts, deeds or omissions of the relator

in a card game throughout the night before, and had been drinking beer. An officer chose this occasion to tell plaintiff that compliance with the regulation had not and could not be had, wherefore there would be no re-enlistment (and consequently no incentives) at that time. Plaintiff must have expressed himself more forcefully than Navy custom sanctions in exchanges between enlisted men and commissioned officers, for the officer ordered him under barracks arrest and to undergo a test for intoxication. Plaintiff returned to barracks, gathered up his gear, including his honorable discharge, and without advising or consulting with anyone, departed for home.

in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and that the relator did not by his misconduct or negligence cause or bring about his own prosecution.

8. As a direct result of his conviction and imprisonment, plaintiff has been damaged in the following particulars.

(a) Pecuniary losses:

(1) Loss of earning power while awaiting and undergoing trial and during confinement. Plaintiff was capable of earning his living as a farmer and as a machinist. During his last two years of high school, while his father was working in a war plant some 65 miles from home, plaintiff was in charge of the family farm, being the oldest of seven boys, and next to the oldest of the ten children. Upon graduation from high school, plaintiff completed a 400-hour machinist course and then worked for a month and a half for the Ertel Machine Shop, Indianapolis, Indiana, as an engine lathe operator for $30 per week. During his wartime naval service, plaintiff completed two machinist's courses, receiving certificates therefor, and worked throughout his first and second term of enlistment as an aviation mechanic. Between plaintiff's first and second terms of confinement by the Navy, he was employed by three different farmers in Iowa at $110 per month plus room, board and laundry. He was working for the Tama Hawk, a newspaper in Tama, Iowa, earning $55 per week, when he was arrested by the Navy for the second time.

(2) Expense (approximately $200) incurred in effecting his release.

(3) Some impairment of earning power. After plaintiff's release on writ of *habeas corpus*, he worked for the Cherokee Courier as a job printer and linotype operator (January 1950). Subsequently, while serving in the Air Force, plaintiff received additional training in the printing trades. From the time of his release from the Air Force in January 1952, to the time of the trial in this court, plaintiff worked for three different printing concerns earning from $70 per week to $120 per week. He never told his employers of his troubles with the Navy. He was never discharged from employment. He was reluctant to make friends and

seemed unable to settle down in one place. He was convinced that no one would wish to associate with him if it were known that he had "done time" in a federal penitentiary. His earning power was impaired as the result of emotional disturbance and shock following such confinement. This damage is continuing in nature.

(b) Nonpecuniary losses:[4]

(1) Deprivation of liberty while undergoing trial and during confinement. Prior to his conviction by the Navy, plaintiff had never been in any serious trouble. He had served one 10-day sentence in the hospital brig for unauthorized absence while recuperating from a shoulder operation in 1947. While on 30-day leave in the Fall of 1947, he was picked up by the Indianapolis police along with several other young men, on a charge of carrying concealed weapons. After a night in jail, he was released and the charge dismissed for lack of evidence. In January 1949, following his first confinement in Portsmouth, New Hampshire, plaintiff was jailed for 72 hours in Sioux City, Iowa. He had been booked for investigation and was released without any charge being filed.

(2) Humiliation.

(3) Estrangement in varying degrees from his family (parents and brothers and sisters) and from former friends; and

(4) A broken engagement to be married.

9. Plaintiff has been damaged in excess of $5,000.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiff is entitled to recover, and it is therefore adjudged and ordered that he recover of and from the United States five thousand dollars ($5,000).

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[4] Many details are in the record, including a dishonorable discharge from the Air Force, upon which defendant relies as proof of emotional instability on the part of plaintiff. Whatever weight might be ascribed to these incidents, singly or together, is overbalanced by proof (1) that plaintiff, up to the time he joined the Navy in 1942, was a normal American farm boy; (2) that his record in World War II was one of courage unmarred by misbehavior, and (3) that all incidents tending to show instability occurred *after* his conviction and imprisonment by the Navy. It is reasonable to conclude that plaintiff's emotional instability as evidenced by his unhappy Air Force career and his subsequent frequent job changes, was the result of his conviction and confinement by the Navy.

In the District Court of the United States
for the Northern District of Illinois
Eastern Division
Civil Action No. 49 C 1771

UNITED STATES OF AMERICA, EX REL, JAMES JOSEPH ROBERSON, RELATOR

vs.

J. S. KEATING, COMMANDER OF NAVAL TRAINING CENTER, GREAT LAKES, ILLINOIS, ET AL., RESPONDENTS

CERTIFICATE OF INNOCENCE

Application having been made herein for a Certificate of Innocence, fulfilling the requirements of Section 2513, Title 28, United States Code in order that relator may pursue his remedy under the provisions of Section 1495 of said Title; and,

It appearing to the Court that the relator was issued an Honorable Discharge from the United States Navy on December 1, 1947, and thereafter, that the relator was tried by Navy General Court Martial and on March 6, 1948, was found guilty of several charges and sentenced to be dishonorably discharged from the service and confined for a period of four years, reduced by the convening authority to three years and eleven months, of which period of confinement the relator served eight months before being released on probation; and,

It appearing further to the Court from the opinion filed herein on December 12, 1949, by Judge Elwyn R. Shaw, now deceased, that the record does not indicate any act of fraud, deceit or misconduct on the part of relator in securing

the aforesaid honorable discharge, and that all of the things charged against the relator after the date thereof, namely December 1, 1947, were beyond the jurisdiction of the Navy Court Martial and are therefore void, and there being a total absence of anything to indicate any wrongdoing on the part of the relator; and,

It appearing further that the aforesaid conviction by Navy General Court Martial was set aside by this Court and held to be void on the ground the relator was not guilty of the offenses of which he was convicted and that the acts, deeds, or omissions of which the relator was charged did not constitute an offense against the United States or any State, Territory or the District of Columbia, and that he did not by misconduct or neglect cause or bring about his own prosecution; and that no appeal was taken by the Government from the order entered by this court:

NOW THEREFORE, pursuant to said Section 2513 of Title 28, I hereby certify that the relator was not guilty of the offenses of which he was convicted, and for which he served confinement for eight months, and that said conviction was set aside by this Court and held to be void, and that the acts, deeds or omissions of the relator in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and that the relator did not by his misconduct or negligence cause or bring about his own prosecution.

s/ PHILIP L. SULLIVAN,
Judge, United States District Court.

Date: FEBRUARY 19, 1952

U. S. GOVERNMENT PRINTING OFFICE: 1953

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No. 775

IN THE

Supreme Court of the United States

October Term, 1954

THE UNITED STATES, *Petitioner*

v.

JAMES JOSEPH ROBERSON, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE

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October Term, 1954

No. 775

THE UNITED STATES, *Petitioner*

v.

JAMES JOSEPH ROBERSON, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

After service in the United States Navy during the last war, James Roberson re-enlisted in July, 1946, for a period of two years. He received an honorable discharge with respect to such enlistment on December 1, 1947 (R. 9, 30). Thereafter, on March 26, 1948, he was tried by a Navy General Court Martial on charges of drunkenness, disobeying the lawful order of his superior officer, desertion, conduct to the prejudice of good order and discipline, breaking arrest, and unauthorized absence. All of these offenses were alleged to have occurred after December 1, 1947 (R. 9, 30).

Based upon his honorable discharge of December 1, 1947, Roberson entered a plea to the jurisdiction of said

Court Martial, which plea was overruled.[1] He was convicted of the aforesaid charges and the Court Martial sentenced him to be confined for a period of four years and to be dishonorably discharged. Upon review by the Secretary of the Navy, the sentence was reduced to a bad conduct discharge and confinement for two years (R. 10, 30). Roberson was imprisoned from March 26 to December 15, 1948, a period of 8 months and 19 days, following which he was released from confinement for restoration to duty, subject to probation. Instead of reporting for duty, Roberson went home, relying upon his honorable discharge of December 1, 1947 (R. 10, 31).

On September 19, 1949, Roberson was again arrested and placed in confinement by the Navy on a charge of desertion. He remained in prison until December 8, 1949, when he was released upon order of the United States District Court for the Northern District of Illinois in habeas corpus proceedings. The District Court held that the action of the Navy General Court Martial was beyond its jurisdiction and therefore void by reason of the honorable discharge granted to Roberson on December 1, 1947 (R. 10, 31).

Thereafter, in a separate proceeding, Roberson applied to the aforesaid District Court for a certificate of innocence which would meet the requirements of 28 U.S.C. § 2513.[2] The certificate was issued under date of February 19, 1952 (R. 10, 11, 31).

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[1] The facts as to Roberson's plea to the jurisdiction were alleged in his petition filed in the Court below (R. 2) and admitted in the Government's answer (R. 7), and are also included as part of the agreed facts in the Pre-Trial Memorandum, page 2. The Pre-Trial Memorandum is included in the record filed with this Court.

[2] The first paragraph of the certificate (Plaintiff's Exhibit No. 1) sets forth the recitals pertaining to his application therefor.

Roberson then brought this action in the Court of Claims under 28 U.S.C. § 1495 and 2513, claiming the statutory maximum of $5000 as damages (R. 1-5). The answer of the Government admitted the factual averments of Roberson's petition,[3] but denied that the certificate of innocence was sufficient to give the Court of Claims jurisdiction under 28 U.S.C. § 1495 and 2513 (R. 7).

At the hearing of this cause, the certificate of innocence was received in evidence as Plaintiff's Exhibit No. 1, its authenticity being conceded by the United States (Pre-Trial Memorandum, pages 3, 4). Following the hearing, the Commissioner submitted his report on October 22, 1953 (R. 9-11) and briefs were thereupon filed by both parties (R. 30).

On April 7, 1954, the cause was argued and submitted to the Court on the merits (R. 12). Following, on October 5, 1954, the Court of Claims rendered its decision and awarded judgment in favor of the plaintiff for the maximum amount of $5000. It may be noted from the holding, however, that Roberson sustained damages in excess of that amount (R. 13-25). The damages were found to have been the direct result of his conviction and imprisonment (R. 31-33).

In the interim between April 7, 1954, when this cause was argued and submitted to the Court for decision, and the announcing of its decision on October 5, 1954, Roberson died, the date of death being July 28, 1954.[4] A motion was subsequently filed to amend the entry of judgment of October 5, 1954, and for entry of said judgment *nunc pro*

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[3] While the factual averments of paragraph 8 of Roberson's petition were denied in the answer (R. 7), the Government admitted them in the Pre-Trial Memorandum, page 3.

[4] A certificate evidencing the death of Roberson on July 28, 1954, was filed with the Court below as an exhibit to a motion to substitute, which motion the Court denied on December 1, 1954.

tunc as of April 7, 1954 (R. 35). By order dated November 30, 1954, the Court withdrew and vacated the judgment of October 5, 1954, and entered judgment for the plaintiff for $5000 *nunc pro tunc* as of April 7, 1954 (R. 37).

In its opinion, the Court below ruled that unjust convictions and imprisonments by courts martial are within the purview of the unjust conviction statute (R. 18). Also, it concluded that the District Court in Illinois had jurisdiction to entertain plaintiff's application for a certificate of innocence and to issue that certificate upon being satisfied that plaintiff was innocent within the meaning of the statutory provision, and that the Court of Claims was bound by such recitals on the question of plaintiff's innocence unless the certificate is set aside upon order of the Circuit Court of Appeals (R. 22). In a concurring opinion, by Judge Whitaker, with whom Chief Judge Jones concurred, it was observed that the habeas corpus court had jurisdiction to hold that an offense was not committed and in granting the certificate, it necessarily held that plaintiff was innocent of any offenses since it was shown that he was not in the military service at the time of the alleged acts (R. 26). Judge Madden dissented on the ground that the District Court did not have jurisdiction to grant the certificate of innocence (R. 27-29).

ARGUMENT

I UNLAWFUL CONVICTIONS AND IMPRISONMENTS BY COURTS MARTIAL ARE WITHIN THE PURVEW OF THE UNJUST CONVICTION STATUTE.

In its petition the Government endeavors to establish that the Unjust Conviction Statute is not applicable to court martial convictions. Reference is made to the title and the legislative history of this statute for the purpose of showing that it was intended to give relief only to those "erroneously convicted in a Federal court" and "in the

United States courts". The Government then asserts that military tribunals are not Federal courts or courts of the United States.

Respondent contends that Section 1495 is clear and unequivocal in its terms and that no basis exists for resort to legislative aids in construing it. The statute confers jurisdiction upon the Court of Claims to render judgment "upon any claim for damages by any person unjustly convicted of an offense against the United States and imprisoned". It may be noted that the language of the section does not specify the courts in which such convictions shall have been imposed nor does it exclude courts martial convictions. Rather, it is directed at granting relief to those unjustly convicted of offenses against the United States. Accordingly, the respondent contends, as stated by this Court in *Fairport R. Co.* v. *Meredith,* 292 U. S. 589, 594, that the "title of an act and the history leading up to its adoption, as aids to statutory construction, are to be resorted to only for the purpose of resolving doubts as to the meaning of the words used in the act in case of ambiguity".

The scope of Section 1495 was very carefully considered by the Court below. It also reviewed the case of *McLean* v. *United States,* 73 F. Supp. 775, wherein the same issue had been raised. In this connection, in the *McLean case,* it was stated at page 777, that:

> "One tried by a court martial is tried for an offense against the United States."

It is submitted, therefore, that the conclusion reached by the Court below in construing Section 1495 conforms with prior decisions and is based upon sound reasoning. Respondent thus contends that unjust convictions and imprisonments by courts martial are within the scope of this statute.

The Government makes reference to 50 U.S.C. § 660, 662 and 740, all provisions of the Uniform Code of Military Justice (Act of May 5, 1950, 64 Stat. 107, et. seq., effective May 5, 1951), as being an indication that courts martial convictions do not come within the Unjust Conviction Statute. In the instant case, Roberson was issued an honorable discharge on December 1, 1947. It is submitted that after his discharge no ground would have existed for him to claim any of the relief suggested by the petitioner. To the contrary, there appears to be no inconsistency or overlapping as between the provisions of 28 U.S.C. § 1495 and 2513 on the one hand, and 50 U.S.C. § 660, 662 and 740 on the other. Sections 1495 and 2513 provide only for damages for an unjust conviction and imprisonment, whereas the sections of Title 50 which are referred to, contain no provision for the awarding of such damages.

II THE ILLINOIS DISTRICT COURT WAS VESTED WITH JURISDICTION TO ISSUE THE CERTIFICATE OF INNOCENCE.

The contention is made by the petitioner that the Illinois District Court was without power to issue the certificate of innocence. In support of its position, the Government says that the ruling of the District Court on the petition for habeas corpus gave it no authority to review the merits of Roberson's conviction by the Navy General Court Martial.

The Court below reviewed at some length the Government's contention on this issue. It noted the lack of any indication in the statute "that a person whose court martial conviction has been set aside by writ of habeas corpus is less entitled to a hearing upon his application for a certificate of innocence than the person whose civilian court conviction has been set aside by an appellate court on grounds having nothing to do with his guilt or innocence", making reference to *Andolschek* v. *United States*, 111 Ct. Cls. 567 (R. 19). In the concurring opinion

by Judge Whitaker, it was observed that the District Court had jurisdiction to hold that an offense was not committed. Moreover, it was stated in the concurring opinion, that in granting the habeas corpus writ, the District Court necessarily held that plaintiff was innocent of any offense since it was shown that he was not in the military service at the time of the alleged acts. It was concluded, therefore, that the District Court "had complete jurisdiction to hold that he was innocent of any offense", and could "certify to that fact" (R. 26).

Respondent contends that the District Court had the power to determine, in the habeas corpus proceeding, whether the Navy Court Martial possessed the requisite jurisdiction to try Roberson. In the exercise of that power, the District Court found that his honorable discharge of December 1, 1947, was valid. It thereupon set aside the court martial conviction and held it to be void. Respondent submits that this Court has, in many similar cases, upheld the type of action taken by the Illinois District Court in this instance. Notable among such cases is that of *Collins* v. *McDonald*, 258 U.S. 416, 418, wherein it was stated, as follows:

> ". . . the court-martial being a special statutory tribunal, with limited powers, its judgment is open to collateral attack, and unless facts essential to sustain its jurisdiction appear, it must be held not to exist."

Another similar case is that of *Humphrey* v. *Smith*, 336 U.S. 695. On the issue here in question this Court observed at page 696, as follows:

> "It is contended that the court-martial was without jurisdiction to try respondent. If so the court-martial exceeded its lawful authority and its judgment can be invalidated despite the limited powers of a court in habeas corpus proceedings."

In *United States Ex Rel Hirshberg* v. *Cooke*, 336 U.S. 210, the petitioner had been convicted by Navy Court Mar-

tial of an offense which occurred in a prior enlistment and for which he had received an honorable discharge. Petitioner then sought a writ of habeas corpus in a District Court charging that the court martial judgment was void because of want of statutory power to convict him for an offense committed, if at all, during his prior enlistment. The District Court sustained the petitioner's contention, which position was upheld by this Court in reversing the decision of the Circuit Court of Appeals.

It follows, therefore, that since the Illinois District Court had the power to set aside the court martial conviction and hold it to be void for lack of jurisdiction, similarly, it had the authority, conferred by the provisions of 28 U.S.C. 2513 to issue the certificate of innocence. The holding of the Court below, giving such effect to the unjust conviction statute is consonant with the above-cited decisions of this Court.

For the foregoing reasons, the respondent contends that this ruling of the Court below was correct.

III THE ENTRY OF JUDGMENT NUNC PRO TUNC AS OF APRIL 7, 1954, CONFORMS WITH ESTABLISHED PRINCIPLES OF LAW AND RENDERS MOOT THE QUESTION RAISED BY PETITIONER CONCERNING ABATEMENT OF THE ACTION.

The record establishes that this cause was argued in the Court below and submitted on the merits on April 7, 1954. Roberson died on July 28, 1954, and the opinion of the Court was rendered October 5, 1954. The judgment was entered on November 30, 1954, nunc pro tunc as of April 7, 1954.

Respondent contends that the Court below had the inherent power to cause the judgment to be entered nunc pro tunc as of the date it took this case under advisement. In support of this position, respondent relies upon the holding of this Court in *Mitchell* v. *Overman* 103 U.S. 62, 64, 65, wherein it was stated, as follows:

> "The adjudged cases are very numerous in which have been considered the circumstances under which courts may properly enter a judgment or a decree as of a date anterior to that on which it was in fact rendered . . . the rule established . . . is that where the delay . . . arises from the act of the Court . . . the judgment . . . may be entered retrospectively . . . ."

A number of cases have been decided under Federal statutes wherein because of the death of one of the parties to the cause of action, a judgment nunc pro tunc has been entered in the interests of justice. In this respect, reference is made to the following cases:

Quon Quon Poy v. *Johnson, Commissioner,* 273 U.S. 352;

Harris v. *Commissioner,* 340 U. S. 106;

Barnett v. *United States* (9 C.C.A.-1936), 82 F. (2d) 765;

United States v. *Paddock* (1946), 68 F. Supp. 407; and

MacDonald v. *DuMaurier,* 75 F. Supp 653.

In addition, respondent desires to list other cases in which the general proposition of law herein advanced has been upheld. These are as follows:

Richardson v. *Green,* 130 U.S. 104;

Bell v. *Bell,* 181 U.S. 175;

Lenoir Car Works v. *Trinkle* (6 C.C.A.-1915), 228 Fed. 634;

Madden v. *LaCofske* (9 C.C.A.-1934), 72 F. (2d) 602; and

In Re Pillsbury's Estate (1917), 175 Cal. 454, 166 Pac. 11, 3 A.L.R. 1396.

Other authorities to which the respondent makes reference are the annotations in 3 A.L.R. 1403 and 68 A.L.R.

261 and 30 *Am. Jur.*, Judgments, Sections 43 to 51, inclusive. In section 43 thereof, as to the authority to render such a judgment, it is said that the "power is not dependent upon statutory authorization but exists at common law. It has been held to be a discretionary power . . .". Further on, in Section 50 of this treatise, it is stated as follows:

> "The fact that an action is of a kind which does not survive the death of a party thereto does not preclude the application of the rule authorizing the rendition of a judgment nunc pro tunc after the death of a party, whether the party who dies is the plaintiff in whose favor, or the defendant against whom, the verdict was returned."

It is submitted that the facts of this case bring it squarely within the principle enunciated in *Mitchell* v. *Overman*, supra. Buttressed by the other decisions and authorities cited herein, the respondent submits that the action of the Court below in entering the judgment nunc pro tunc as of April 7, 1954, gives full effect thereto. Respondent thus contends that such action on the part of the Court below was correct and proper and is in the interests of justice. Respondent says also, that the entry of the judgment nunc pro tunc thereby rendered moot any question concerning abatement of the action.

CONCLUSION

Statistics are presented by the petitioner to indicate that complications could arise from the instant decision by reason of the volume of cases heard by military tribunals. Respondent contends that the issues herein involved are neither different from, nor broader than, those presented by any other courts martial conviction where its jurisdiction is tested by means of a habeas corpus proceeding. Accordingly, it would seem that in the circumstances no

cause for concern is justified. Moreover, this petition does not appear to raise any question which warrants the exercise of jurisdiction within the scope of Rule 19 of this Court.

It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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Washington, D. C.
May, 1955.